

Milltown Dam Water Right & Blackfoot Water Management

Frequently Asked Questions

The Blackfoot Drought Committee has been tracking negotiations between the State of Montana, the Confederated Salish and Kootenai Tribes, and the United States to settle off-reservation, in-stream flow water rights for the Flathead Indian Reservation, which include water rights in the Blackfoot River. The following list of questions and responses was compiled to help water users in the Blackfoot Watershed better understand potential changes in water management as a result of the settlement.

Question: Why are the Tribes interested in water in the Blackfoot and what are their rights to it?

Answer: The Hellgate Treaty of 1855, which established the Flathead Indian Reservation, reserved the Tribes legal claim to off-reservation water rights for instream flow in the upper Clark Fork Basin based on historic and cultural use. In the Blackfoot, the Tribes' priority is maintaining instream flows for the enhancement of fish habitat and maintaining cultural connections.

Question: What entity is negotiating on behalf of the State and its water users?

Answer: The Montana Reserved Water Rights Compact Commission (Commission). The Commission was legislatively established in 1979 to conclude compacts for the equitable division and apportionment of waters between the State and its people and the several Indian Tribes claiming reserved water rights within the State (MCA 85-2-701), and between the State and its people and the federal government claiming non-Indian reserved waters within the State (MCA 85-2-703). Since its inception, the Commission has completed 15 compacts with six tribes and five federal agencies in Montana.

Question: What has been proposed in the negotiations with regard to the Blackfoot?

Answer: After the Milltown Dam was removed in 2008, the State of Montana took ownership of the hydropower water right in the Clark Fork River. If the State had not assumed ownership of the right, the Tribes were next in line to acquire it so as the parties began negotiations for off-reservation water rights, the concept of co-ownership of the water right was proposed.

When the State took ownership, there was an expectation that the hydropower water right would be changed to an instream flow right. The hydropower water right has a priority date of December 11, 1904 and a maximum protected flow rate of 2,000 cubic feet per second (cfs). However, as part of the settlement, it has been proposed that enforcement of the new instream flow right be based on a hydrograph with a minimum flow rate of 1,200 cfs; split into minimum instream flows of 500 cfs in the Clark Fork River as measured at Turah and 700 cfs as measured in the Blackfoot River near Bonner. The priority date would not change. The minimum instream flow for the Blackfoot is slightly higher as the Blackfoot River provides 52% of the Clark Fork's total flow at Milltown and because a minimum instream flow value of 700 cfs for the Blackfoot was established through the 1971 Murphy Right.

In addition to the Milltown water right, the State proposed that the Tribes would share ownership of existing water rights for instream flow and recreation purposes with Montana FWP. This includes the Murphy Right in the Blackfoot.

Question: If a settlement is reached as currently proposed, how will it affect my water right and water management in the Blackfoot?

Answer: Before answering this question, a few items are worth mentioning. First, the Tribes have stated that they wish to preserve the current workings of the Blackfoot Drought Response Plan, based on concepts of shared sacrifice and more aggressive water management in period of short water supply. Second, the current proposal includes a 10-year "deferral period" during which enforcement of the Milltown right will be suspended and stakeholders can work with the State and the Tribes on management issues that arise from settlement requirements. Third, the Murphy Right and the Milltown Right are parallel water rights. The State and the Tribes **cannot** add these rights together and make calls for water based on a minimum instream flow of 1,400 cfs in the Blackfoot River. Finally, the following response is only an interpretation of potential effects by the Blackfoot Drought Committee. The full effect of the settlement will not be known until water management under it is in place.

The Milltown Right

Water users in the Blackfoot are familiar with the Murphy Instream Flow Right after years of participating in the Blackfoot Drought Response. In short, the Murphy Right provides for fisheries protection and recreation through the maintenance of a minimum instream flow (700 cfs in the Blackfoot River near Bonner). The Milltown water right is similar in that it will also provide for fisheries protection and recreation through the maintenance of a minimum instream flow (700 cfs in the Blackfoot River near Bonner). The primary difference between

the two is the priority date. The Murphy Right has a priority date of 1971, whereas the Milltown water right has a priority date of 1904.

Any water right with a priority date after December 11, 1904 is junior to the Milltown right. This holds true regardless of the negotiations or proposed settlement. When the settlement is ratified, we expect the Milltown right to be enforced more diligently than it has in the past. From a drought management perspective, this will most likely mean that individual drought management plans may need to be modified in order to avoid a call for water when flows fall below 700 cfs at Bonner. That said, many cooperators in the Blackfoot Drought Response have already incorporated the majority of their water rights into their drought plans and may not see significant changes to their water management.

Non-irrigation water uses (stock water, domestic, etc.) are unaffected by the proposed settlement as the State, Tribes, and the United States have relinquished their right to make a call against existing water rights whose purpose does not include irrigation. Under the settlement, calls for water made against water rights to satisfy instream flow rights will come exclusively from water rights whose purpose(s) include irrigation. Calls for water can be made against all surface water irrigation rights with junior priority dates, regardless of flow rate. Calls for water against irrigation from groundwater sources are limited to junior water rights with flow rates above 100 gallons per minute.

The Milltown Right, and several other water rights included in the Compact, will not go through the regular basin-by-basin Montana General Stream Adjudication process. Instead, the parties will request that the Montana Water Court consider the Compact in a special proceeding. The Water Court will review the water rights in the Compact as a whole, provide an opportunity for objections, and issue a decree if it finds the Compact reasonable and equitable. The Water Court can also reject the Compact if it finds the Compact unreasonable and inequitable.

Murphy Right

Aside from co-ownership by Montana FWP and the Tribes, the attributes of the Murphy Right will not change and will remain a valid and enforceable water right. Unlike the Milltown Right, calls for water under the Murphy Right can be made on a more extensive range of purposes, sources, and flow rates, consistent with all other state law-based water rights.

Murphy Rights in the Blackfoot shall proceed through the regular Montana General Stream Adjudication for Basin 76F as though they were not included in the Compact.

Co-ownership of the Milltown and Murphy Rights

As noted, the Tribes will share ownership of the Milltown water right as well as the Murphy Right with Montana FWP. The workings of co-ownership of these rights are not well-defined in the proposed Compact. However, the Compact does specify that under co-ownership, each party has the unilateral right to exercise these water rights and that the Tribes and Montana FWP will confer every two years to discuss the exercise of these rights with the goal of establishing a joint management plan.

Co-ownership has many unanswered questions at this time but the Drought Committee will encourage a community-driven, partnership approach to management of these rights in the future.

Question: What is the schedule for the settlement process?

Answer: A proposed Compact was released for public review on October 3, 2012. An updated version of the draft Compact was posted on November 8, 2012. . The proposed Compact can be found on the Montana Reserved Water Rights Compact Commission's website (<http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp>). It is a lengthy document that covers much more than just water rights in the Blackfoot River. **Blackfoot water users will be most interested in pages 19-21**, which cover the Milltown water right and the Murphy Right. The draft compact also includes several appendices. **Blackfoot water users will be most interested in Appendix 26 and Appendix 27**. For those interested in getting an overview of the entire Compact, the Compact Commission has put together much shorter summary. The Compact summary can also be found on the Compact Commission's website.

To our knowledge, there isn't a specific deadline for comments. However, we do know that the negotiating parties would like to have comments in by early December. There are several ways to submit comments:

1. Written comments can be mailed to:
Mr. Chris Tweeten
Chair, MT RWRCC
2705 Spurgin Road, Building C
Missoula, MT 59804
2. Written comments can be emailed to dnrrwrcc@mt.gov
3. Public meetings are scheduled to explain the drafts, answer questions, and take public comment. **For folks in the Blackfoot, a public meeting will be held on December 4, 2012 in the Ovando Gym at 7:30pm.** For a list of additional public meetings, visit <http://www.dnrc.mt.gov/rwrcc/meetings/Meetings.asp>.